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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

EDWARD MAKARON, on behalf of himself and all others similarly situated, Plaintiff, v. ENAGIC USA INC., Defendant.	Case No. 2:15-CV-05145-DDP-E **DEFENDANT ENAGIC USA, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION** **Hon. Dean D. Pregerson** **Hearing Date: March 13, 2017** **Time: 10:00 a.m.** **Place: 1st Street Courthouse, Courtroom 9C, 350 W. 1st Street, Los Angeles, California 90012**

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PRELIMINARY STATEMENT

This purported class action concerns thousands of alleged individual violations of the Telephone Consumer Protection Act ("TCPA"). Specifically, Plaintiff claims that Defendant Enagic USA, Inc. ("Enagic") and/or Enagic's thousands of independent distributors made thousands of illegal telephone calls to thousands of different individuals throughout the United States. Like many TCPA cases, this case is particularly ill-suited for class certification because it is fraught with individualized issues arising from the unique circumstances of each allegedly illegal call. Indeed, the diverse and disparate circumstances under which each putative class members' purported claims arose make it impossible for Plaintiff to satisfy the requirements of Federal Rule of Civil Procedure 23. Accordingly, Enagic respectfully requests that the Court deny Plaintiff's Motion for Class Certification and Plaintiff's informal request to conduct pre-certification discovery.

FACTUAL BACKGROUND

Enagic is a direct selling company that markets various products and services to consumers through a network of thousands of independent distributors who reside and operate in most states. *See* **Exhibit A** at ¶ 3. All of Enagic's independent distributors are independent contractors, and as such, they have broad discretion to determine their own methods of sale and means of securing customers, so long as those methods and means are consistent with Enagic's formal Policies and Procedures (the "Policies"). *See* **Exhibit A** at ¶¶ 4-5; *see also* **Exhibit A-1** at 6.

Enagic does not use automatic telephone dialing systems ("ATDS") or prerecorded voice calls to solicit potential customers, independent distributors, or any other individuals who have not consented to receiving communications from Enagic. **Exhibit A** at ¶ 6. However, individuals who are interested in Enagic and its products frequently provide their telephone numbers and other contact information to Enagic and expressly request that Enagic contact them with information about the company. *Id.* Enagic responds to these requests in various ways, including by telephone. *Id.*

Enagic does not direct or encourage its independent distributors to use ATDS or prerecorded voice calls to solicit potential customers or independent distributors. *Id.* at ¶ 7. In fact, the Policies expressly prohibit independent distributors from using Enagic's name or copyrighted materials in connection with "automatic calling devices or 'boiler room' operations either to solicit independent distributors or retail customers." *Id.*; *see also* **Exhibit A-1** at 30.

To the extent Enagic's independent distributors choose, in their discretion, to contact potential customers by telephone, Enagic does not provide its independent distributors with telephone numbers or other information regarding such potential customers, nor does Enagic participate in any way in obtaining that information.

See **Exhibit A** at ¶ 8. Rather, independent distributors acquire telephone numbers and other information regarding potential customers independently and in a variety of different ways. *Id.*

Enagic does not possess, maintain, or have access to records of any telephone calls that its independent distributors have made to potential customers or any other third parties. *See* **Exhibit A** at ¶ 9. If any such records exist, they would be possessed and maintained separately by each independent distributor. *Id.* Likewise, Enagic does not possess, maintain, or have access to any records showing whether, or to what extent, independent distributors may have used ATDS or prerecorded voice calls to call individuals who have expressly consented to receive such calls. *See* **Exhibit A** at ¶ 10. As explained in the Policies, Enagic does not, and cannot, endeavor to regulate its independent distributors' use of ATDS or prerecorded voice calls in ways that are legal. *Id.*; *see also* **Exhibit A-1** at 30.

ARGUMENT AND AUTHORITIES

I. LEGAL STANDARDS GOVERNING CLASS CERTIFICATION

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). Federal Rule of Civil Procedure 23 governs the class certification analysis and ensures that a departure from this general rule is justified. *Id.* at 349. The class certification analysis principally involves a two-part inquiry: (1) the party seeking class certification must satisfy all four requirements of Rule 23(a)—that is, numerosity, commonality, typicality, and adequacy; and (2) the party seeking class certification must satisfy at least one of the requirements of Rule 23(b). *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979-980 (9th Cir. 2011). In addition, the party seeking class certification must define an ascertainable and identifiable class. *See In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 565 (C.D. Cal. 2014). "A class is sufficiently defined and ascertainable if it is 'administratively feasible for the court to determine whether a particular individual is a member.'" *Id.* (quoting *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998)).

The Supreme Court has instructed that "Rule 23 does not set forth a mere pleading standard." *Dukes*, 564 U.S. at 350. Rather, the party seeking class certification must affirmatively demonstrate his compliance with Rule 23, and the Court must conduct a "rigorous analysis" of the Rule 23 prerequisites that frequently entails looking beyond the facts alleged in the complaint to determine how the merits of the case will actually be tried. *Id.* at 350-51.

II. THE PUTATIVE CLASS IS NEITHER ADEQUATELY DEFINED NOR CLEARLY ASCERTAINABLE

A. The putative class is an improper "fail-safe" class.

A fail-safe class is one in which membership in the class is contingent on the validity of the putative class members' substantive claims. As the Ninth Circuit has explained: "The fail-safe appellation is simply a way of labeling the obvious problems that exist when the class itself is defined in a way that precludes membership unless the liability of the defendant is established." *Kamar v. RadioShack Corp.*, 375 F. App'x 734, 736 (9th Cir. 2010). "When a class is so defined, once it is determined that a person who is a possible class member cannot prevail against the defendant, that member drops out of the class." *Id.* Fail-safe classes cannot be certified because they are "palpably unfair to the defendant" and "unmanageable." *Id.* In addition, fail-safe classes cannot be certified because they are unascertainable until after a judgment on the merits is entered. *See, e.g., Brazil v. Dell Inc.*, 585 F. Supp.2d 1158, 1167 (N.D. Cal. 2008); *Velasquez v. HSBC Finance Corp.*, No. 08-4592-SC, 2009 WL 112919, at *4 (N.D. Cal. Jan. 16, 2009).

Here, Plaintiff proposes the following class definition:

> All persons within the United States who received any telephone calls from Defendant or one of its Distributor-Agents to said person's cellular telephone made through the use of any automatic telephone dialing system or an artificial or prerecorded voice and such person had not previously consented to receiving such calls within the four years prior to the filing of the Complaint.

(Doc. 24 at 21-22; Doc. 32-1 at 2). This definition plainly tracks the elements of a TCPA claim such that membership in the class will be contingent on the success of a particular individual's substantive claim. Indeed, "[t]he three elements of a TCPA claim are: (1) the defendant called a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient's prior express consent." *Meyer v. Portfolio Recovery Assocs.*, 707 F.3d 1036, 1043 (9th Cir. 2012). All of these substantive elements are present in Plaintiff's proposed class definition, and thus the identity of class members cannot be ascertained until after a judgment on the merits has been entered.

Recently, district courts within the Ninth Circuit have refused to certify TCPA classes that are indistinguishable from the class proposed by Plaintiff in this case because the class definitions proposed would create improper fail-safe classes. *See Dixon v. Monterey Fin. Svcs., Inc.*, No. 15-cv-03298-MMC, 2016 WL 3456680, at *4-*5 (N.D. Cal. June 24, 2016) (*Dixon I*); *Dixon v. Monterey Fin. Svcs., Inc.*, No. 15-cv-03298-MMC, 2016 WL 4426908, at *1-*2 (N.D. Cal. Aug. 22, 2016) (*Dixon II*); *Olney v. Job.com, Inc.*, No. 12-cv-01724-LJO-SKO, 2013 WL 5476813, at *11 (E.D. Cal. Sept. 30, 2013).[1] As the court explained in *Dixon I*, the putative class was an improper fail-safe class because "defining a TCPA class to include anyone who received a call without prior express consent means that only those potential members who would prevail on this liability issue would be members of the class." *Dixon I*, 2016 WL 3456680, at *4. The same reasoning and result should obtain here. Specifically, the Court should deny Plaintiff's Motion for Class Certification because the class definition offered by Plaintiff would create an improper fail-safe class.

[1] Notably, Plaintiff's counsel also served as counsel for the plaintiffs in these cases.

B. Plaintiff's proposed method for identifying class members is not administratively feasible.

As already noted, Plaintiff bears the burden of proposing an administratively feasible method for identifying class members. *See In re ConAgra Foods, Inc.*, 302 F.R.D. at 565. Plaintiff has wholly failed to meet this burden, and the Court should refuse to certify the putative class for this additional reason.

Plaintiff claims he will be able to identify class members by obtaining Enagic's "outbound dial list" and having a technology consultant determine: (1) which calls on the list were made using ATDS and/or a prerecorded voice; and (2) which calls were made to cellular phones. (Doc. 32-1 at 9). This claim is unavailing because it is predicated on erroneous and unsupported assumptions regarding Enagic's records. Indeed, Enagic does not possess, maintain, or have access to an "outbound dial list" or any other records that reflect telephone calls made by its thousands of independent distributors. *See* **Exhibit A** at ¶ 9. Rather, to the extent such records exist, they would be possessed and maintained separately by each independent distributor. *Id.* Thus, even assuming that Plaintiff could determine from phone records which calls were made using ATDS and/or a prerecorded voice and which calls were made to cellular phones, Plaintiff would have to obtain those records from thousands of independent distributors, many of whom reside outside the subpoena power of this Court. *Id.* at ¶ 3. This would be infeasible, if not completely impossible.

Moreover, even if Plaintiff could somehow acquire all of the relevant records from Enagic's independent distributors, those records would not indicate whether the recipients of the calls reflected in the records ever gave their consent to receive calls from Enagic or its independent distributors. Under the class definition proposed by Plaintiff, the Court must be able to determine whether individuals gave their express consent to be called in order to determine which individuals are included in the class. Plaintiff, however, has offered no method, much less an administratively feasible method, for making this essential determination.

In short, Plaintiff's proposed method for identifying class members is fanciful and based on erroneous and unsupported assumptions regarding Enagic's records. Because it will be administratively infeasible, if not completely impossible, for Plaintiff to identify members of the putative class, Plaintiff's Motion for Class Certification must be denied.

III. PLAINTIFF CANNOT SATISFY THE RULE 23(A) PREREQUISITES

The Court should also refuse to certify the putative class because Plaintiff cannot satisfy all four necessary prerequisites of Rule 23(a). Specifically, Plaintiff cannot show that there are questions of law or fact that are common to the class, nor can Plaintiff demonstrate that his claims are typical of the putative class members' claims. *See* Fed. R. Civ. P. 23(a)(1) and (3).

A. Plaintiff cannot satisfy Rule 23(a)'s commonality requirement.

To satisfy Rule 23(a)'s commonality requirement, the class representative must show that the claims of all the putative class members depend on at least one common contention that is capable of classwide resolution. *Dukes*, 564 U.S. at 350. A common contention is capable of classwide resolution if the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* "What matters to class certification is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* When a class representative cannot show that the defendant acted towards all putative class members in a uniform way, he generally cannot satisfy the commonality requirement. *See id.* at 359 ("Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question.").

Plaintiff erroneously contends that his case presents several common questions of law and fact that support class certification. First, Plaintiff argues that the question of whether Enagic made "autodialed" or "prerecorded voice" calls to consumers is a question that is common to all the putative class members. (Doc. 32-1 at 13). This argument fails, however, because Plaintiff's own proposed class definition includes individuals who received calls from Enagic ***or any one of Enagic's thousands of independent distributors***. Thus, even if Plaintiff were able to prove that Enagic made "autodialed" or "prerecorded voice" calls to consumers, this would not resolve any salient question for class members who claim to have received an illegal call from one of Enagic's independent distributors.

Second, Plaintiff contends that the question of whether Enagic made calls to any telephone number assigned to a cellular telephone service on Enagic's outbound dial list is a common question for all class members. (Doc. 32-1 at 13). As noted above, however, Enagic does not have an outbound dial list or any other record of calls made by its independent distributors. *See* **Exhibit A** at ¶ 9. Rather, if such records exist, they would be possessed and maintained separately by each independent distributor. *Id.* Thus, again, even if Plaintiff could show that Enagic made calls to consumers' cellular telephones, that would not resolve any salient question for class members who purportedly received illegal calls from one of Enagic's independent distributors.

Third, Plaintiff makes the specious claim that the question of whether Enagic obtained "prior express consent" to make autodialed and/or prerecorded voice calls is a question common to all class members. (Doc. 32-1 at 13). As many courts have acknowledged, the question of consent is frequently individualized rather than common to the class. *See, e.g., Blair v. CBE Group, Inc.*, 309 F.R.D. 621, 628

(S.D. Cal. 2015); *Connelly v. Hilton Grand Vacations Co.*, 294 F.R.D. 574, 577 (S.D. Cal. 2013). Indeed, courts have concluded that, "[a]lthough TCPA cases are not 'per se' unsuitable for class resolution, class certification is warranted only when the 'unique facts' of a particular case indicate that individual adjudication of the pivotal element of prior express consent is unnecessary." *Blair*, 309 F.R.D. at 628.

Here, Plaintiff has not presented, and cannot present, any unique facts showing that the issue of consent is susceptible to classwide resolution. To be sure, Plaintiff cannot show that Enagic and its independent distributors acquired consumers' telephone numbers from a single source or by a single method, nor can Plaintiff show that Enagic and its thousands of independent distributors utilized a call list of homogeneously unconsenting call recipients. In fact, just the opposite is true. Enagic's independent distributors have broad discretion to independently determine their own methods of sale and means of securing customers, and to the extent they make calls to potential customers or other third parties, they acquire telephone numbers and other contact information independently and in a variety of different ways. *See* **Exhibit A** at ¶ 8. The variety of factually different scenarios under which putative class members' telephone numbers are obtained leads to the inevitable conclusion that the issue of consent is individualized in this case. *See Connelly*, 294 F.R.D. at 577-79.

Finally, there is no merit to Plaintiff's claim that this case involves a uniform practice by Enagic of making autodialed and/or prerecorded voice calls to consumers' cellular phones. (Doc. 32-1 at 13). Quite the contrary, Enagic's thousands of independent distributors have broad discretion to independently determine their own methods of sale and means of securing customers, including whether to solicit customers via telephone. *See* **Exhibit A** at ¶¶ 5 and 8. In this way, this case resembles *Dukes*, wherein the Supreme Court held that Wal-Mart's policy of giving local supervisors discretion over employment decisions was "just the opposite of a uniform employment practice that would provide the commonality needed for a class action." *Dukes*, 564 U.S. at 355.

In sum, Plaintiff's purported claims, and those of the putative class members, arise from a wide variety of factually different circumstances. As such, the claims of all the putative class members do not depend on any common contentions that are capable of class wide resolution. Therefore, Plaintiff cannot satisfy Rule 23(a)'s commonality requirement, and the Court should refuse to certify the class for this reason.

B. Plaintiff cannot satisfy Rule 23(a)'s typicality requirement.

Class certification is also inappropriate because Plaintiff has not shown, and cannot show, that his claims are typical of the claims of the putative class. Rule 23(a)'s typicality requirement encompasses the question of the class representative's standing, "for 'without individual standing to raise a legal claim, a named representative does not have the requisite typicality to raise the same claim on behalf of a class.'" *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1346 (11th Cir. 2001) (quoting *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000)).

The "irreducible constitutional minimum" of standing consists of three elements that the plaintiff bears the burden of proving: (1) an injury in fact; (2) that is fairly traceable to the defendant's conduct; and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). To satisfy the first element, a plaintiff must establish that he suffered an invasion of a legally protected interest that is both concrete and particularized. *Id.* at 1548. Although Congress "may elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law," that "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* at 1549. As such, a plaintiff cannot demonstrate his standing to sue merely by alleging a procedural violation of a statute, without demonstrating some concrete harm. *Id.* Moreover, "[a] plaintiff who would have been no better off had the defendant refrained from the unlawful acts of which the plaintiff is complaining does not have standing to sue under

Article III of the Constitution to challenge those acts in a suit in federal court." *McNamara v. City of Chicago*, 138 F.3d 1219, 1221 (7th Cir. 1998).

Here, Plaintiff's Second Amended Complaint alleges two types of harm: (1) that he and the putative class members incurred "certain charges or reduced telephone time for which Plaintiff and Class members had previously paid by having to retrieve or administer messages left by Defendant"; and (2) that Plaintiff and the putative class members suffered invasions of privacy. (Doc. 24 at 23). With respect to the first type of harm alleged, Plaintiff does not offer any evidence whatsoever that he incurred certain charges or suffered reduced telephone time as a result of any call he received from Enagic or its independent distributors, despite his burden to do so. *See Dukes*, 564 U.S. at 350 ("Rule 23 does not set forth a mere pleading standard"). Moreover, any charges or reduced phone time incurred by Plaintiff or the putative class members because of their own decision to retrieve or administer messages are directly traceable to their own actions, not the actions of Enagic or its independent distributors. Finally, even if Plaintiff and the putative class members could show that they incurred some "certain charges" or "reduced telephone time" as a result of listening to messages on their phones, Plaintiff offers no evidence of a concrete injury caused by the use of ATDS or a prerecorded voice that is different from the injury that would have been caused by a manually dialed call. *See Romero v. Dep't. Stores Nat'l Bank*, ---F. Supp.3d---, 2016 WL 4184099, at *5 (S.D. Cal. Aug. 5, 2016) ("Plaintiff does not offer any evidence demonstrating that Defendants' use of an ATDS to dial her number caused her greater [harm] than she would have suffered had the calls she answered been dialed manually, which would not have violated the TCPA"); *Ewing v. SQM US, Inc.*, ---F. Supp.3d ---, 2016 WL 5846494, at *2-*3 (S.D. Cal. Sept. 29, 2016) ("Plaintiff does not, and cannot, allege that Defendants' use of an ATDS to dial his number caused him to incur a charge that he would not have incurred had Defendants manually dialed his number, which would not have violated the TCPA"). For all these reasons, Plaintiff's unsupported allegation of harm in the form of "certain charges" and "reduced telephone time" are insufficient to establish Plaintiff's standing to sue.

Likewise, Plaintiff's claim that he and the putative class members suffered invasions of privacy is not sufficient to establish Plaintiff's standing to sue under the TCPA. As the court held in *Romero*, an invasion of privacy may be what Congress sought to deter by promulgating the TCPA, but it is not a sufficient concrete injury, by itself, to satisfy the injury-in-fact element of the constitutional standing analysis. *Romero*, 2016 WL 4184099, at *3.

Ultimately, Plaintiff's failure to establish his own standing to sue in this case precludes him from satisfying Rule 23(a)'s typicality requirement. For this additional reason, the Court should deny Plaintiff's Motion for Class Certification.

IV. PLAINTIFF CANNOT SATISFY ANY RULE 23(B) PREREQUISITE

Plaintiff asks the Court to certify a hybrid class under Rules 23(b)(2) and 23(b)(3). (Doc. 32-1 at 18). As shown below, however, class certification is improper under either section.

A. Class certification is improper under Rule 23(b)(2) because Plaintiff seeks to recover monetary damages on behalf of the putative class and Plaintiff cannot show that Enagic has acted or refused to act on grounds that apply generally to the putative class.

Rule 23(b)(2) permits class certification when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Significantly, Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Dukes*, 564 U.S. at 360-61; *see also Connelly*, 294 F.R.D. at 579. "Although Rule 23(b)(2) classes need not meet the predominance and superiority requirements, it is well established that the class claims must be cohesive." *Connelly*, 294 F.R.D. at 579 (internal quotations omitted). "Indeed, a (b)(2) class may require more cohesiveness than a (b)(3) class." *Id.*

In *Connelly*, the plaintiffs sought to certify a TCPA class under Rules 23(b)(2) and 23(b)(3), and they requested injunctive relief and an award of statutory damages under the TCPA on behalf of each class member. *Id.* The court explained that because the plaintiffs and putative class members would be entitled to recover an individualized award of statutory damages, their "TCPA claims are ineligible for Rule 23(b)(2) certification, regardless of [their] parallel request for injunctive relief." *Id.*

Here, Plaintiff's request for class certification under Rule 23(b)(2) fails for the same reason. To be sure, Plaintiff's Second Amended Complaint plainly requests statutory damages under the TCPA, and Plaintiff's Motion for Class Certification unequivocally states that "each Class member claims statutory damages for invasion of privacy . . ." (Doc. 32-1 at 16). Accordingly, Plaintiff's TCPA claims cannot be certified under Rule 23(b)(2), regardless of Plaintiff's contemporaneous request for injunctive relief.

In addition, certification under Rule 23(b)(2) is improper because Plaintiff cannot show that Enagic acted or refused to act on grounds that apply uniformly to all class members. As discussed above, this case does not concern a policy or practice by Enagic that impacts the putative class members in the same way. Rather, at most, this case involves a policy that endows Enagic's independent distributors with broad discretion to determine their own methods of sale and means of interacting with potential customers. Because of the discretion given to Enagic's independent distributors, each putative class member's claim arises from unique factual circumstances. Consequently, the class lacks the cohesiveness required for class certification under Rule 23(b)(2).

B. Class certification is improper under Rule 23(b)(3) because individualized questions predominate over any questions that might be common to the putative class.

Class certification is permitted under Rule 23(b)(3) only if "the court finds that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Although it is similar to Rule 23(a)'s commonality requirement, "the predominance criterion is far more demanding." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Rule 23(b)(3) demands that the court "give careful scrutiny to the relation between common and individual questions in a case." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). For purposes of this inquiry, an individual question is one that requires putative class members to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each putative class member. *Id.* The ultimate question under Rule 23(b)(3) is whether common or individual questions will be more prevalent in a trial on the merits. *Id.*

The predominance analysis begins with the elements of the underlying cause of action. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011).

In TCPA actions, the predominance inquiry frequently turns on whether the element of consent can be resolved with common or individualized proof. *Blair*, 309 F.R.D. at 628; *Connelly*, 294 F.R.D. at 577. "Although TCPA cases are not 'per se' unsuitable for class resolution, class certification is warranted only when the 'unique facts' of a particular case indicate that individual adjudication of the pivotal element of prior express consent is unnecessary." *Blair*, 309 F.R.D. at 628; *Connelly*, 294 F.R.D. at 577. Thus, the party seeking class certification must "advance a viable theory employing generalized proof to establish liability with respect to the class involved." *Blair*, 309 F.R.D. at 628. When the telephone numbers of the putative class members are obtained from different sources under different circumstances, the element of consent is an individualized question that precludes class certification under Rule 23(b)(3). *Connelly*, 294 F.R.D. at 578-79.

As already discussed, Plaintiff has not identified a single question of law or fact that is common to the putative class and susceptible to resolution with class wide proof. This, alone, precludes certification under Rule 23(b)(3). But even if the Court concludes that some common issue is present, it should still refuse to certify a (b)(3) class because any common issues will be dwarfed at trial by individualized questions regarding: (1) putative class members' express consent; (2) putative class members' standing; and (3) Enagic's purported liability for the acts of its independent distributors.

To begin with, the pivotal element of express consent will inevitably require myriad individualized inquiries that would dominate any trial on the merits. When Enagic contacts potential customers by telephone, it does so with the express consent, and upon the express request, of the potential customers. *See* **Exhibit A** at ¶ 6. Moreover, Enagic's independent distributors have broad discretion to determine their own methods of sale, and to the extent independent distributors choose to contact potential customers by telephone, they acquire potential customers' telephone numbers independently from a variety of different sources under a variety of different circumstances. *Id.* at ¶¶ 3, 5, and 8. Thus, the pivotal issue of consent cannot be resolved with class wide proof, and a trial on the merits will require thousands of individualized inquiries into whether or not each particular class member consented to receive calls from Enagic and/or its independent distributors. As was the case in *Connelly*, the diversity of ways in which putative class members' telephone numbers were obtained precludes class certification under Rule 23(b)(3).

Individualized questions regarding putative class members' standing also preclude certification of a (b)(3) class. The Ninth Circuit has instructed that "[n]o class may be certified that contains members lacking Article III standing." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012). To establish standing in a TCPA case, a plaintiff must demonstrate some concrete harm beyond a mere procedural violation of the statute. *See Romero*, 2016 WL 4184099, at *4-*5; *Ewing*, 2016 WL 5846494, at *2. If a plaintiff did not answer an allegedly illegal call or was not aware of an allegedly illegal call, he cannot demonstrate standing to sue under the TCPA. *Romero*, 2016 WL 4184099, at *4. Likewise, a plaintiff who did answer an allegedly illegal call cannot demonstrate standing unless he can show that the use of an ATDS or prerecorded voice caused him greater harm than would have been caused by a manually-dialed and entirely legal call. *Id.* at *5; *Ewing*, 2016 WL 5846494, at *3. Here, Plaintiff does not allege, much less present evidence of, any concrete harm suffered by him and the putative class members that would be sufficient to establish standing under the TCPA. Further, Plaintiff does not allege or offer any proof that each putative class member suffered the same concrete harm beyond a mere procedural violation of the TCPA. Accordingly, any trial on the merits will inevitably require thousands of mini-trials to ensure that every putative class member has standing. This, too, precludes certification of a (b)(3) class in this case.

Finally, individualized issues pertaining to Enagic's purported liability for the acts of its independent distributors precludes class certification under Rule 23(b)(3). As defined by Plaintiff, the putative class includes individuals who received telephone calls from Enagic ***or*** one of Enagic's independent distributors. Although there is no question that Enagic could be held liable for its own actions, there are substantial questions of fact as to whether Enagic could be vicariously liable for the actions of its independent distributors. Indeed, this Court has already concluded that questions of fact remain regarding Enagic's purported vicarious liability. (*See* Doc. 31). Thus, for putative class members who claim to have received an illegal call from one of Enagic's independent distributors, a jury would have to determine, for each individual class member, whether Enagic is vicariously liable for the independent distributor's actions. For putative class members who claim to have received a call directly from Enagic, however, no additional questions regarding vicarious liability would be necessary. Because the evidence required to establish Enagic's liability would vary from putative class member to putative class member, this is plainly an individualized issue that defeats class certification under Rule 23(b)(3).

V. THE COURT SHOULD DENY PLAINTIFF'S REQUEST FOR PRE-CERTIFICATION DISCOVERY

It is well-established that pre-certification discovery is not required in every case. *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1313 (9th Cir. 1977). Where, as here, the plaintiff cannot make even a prima facie showing of Rule 23's prerequisites, "the burden is on the plaintiff to demonstrate that discovery measures are likely to produce persuasive information substantiating the class allegations." *Id.*; *see also Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985); *Perez v. Safelite Group, Inc.*, 553 F. App'x. 667, 668 (9th Cir. 2014). A district court's decision to deny pre-certification discovery is reviewed for abuse of discretion. *Mantolete*, 767 F.2d at 1424.

Although Plaintiff argues that he is entitled to class certification on the current record, he also requests that "the Court defer ruling on Plaintiff's Motion for Class Certification until after the parties have had the opportunity to complete pre-certification discovery." (Doc. 32-1 at 2). Plaintiff informs the Court that he will submit an amended Motion for Class Certification with information obtained during discovery "to further support the prerequisites of Fed. R. Civ. P. 23(a)," but he offers no meaningful explanation regarding the information he expects to obtain during discovery, nor does he explain how that information will substantiate his class allegations. (Doc. 32-1 at 2). Accordingly, Plaintiff has wholly failed to satisfy his burden of showing that pre-certification discovery would produce information that would substantiate his class allegations.

Moreover, some of the defects in Plaintiff's class allegations cannot possibly be due to a lack of discovery from Enagic, but rather to Plaintiff's failure to provide the Court with necessary information that is, or should be, in his own possession. For instance, pre-certification discovery will not produce any information that Plaintiff does not already possess regarding his and the putative class members' purported concrete injuries, which are necessary to establish their standing to sue under the TCPA. Plaintiff has had more than ample time to collect and submit that information to the Court, but for whatever reason, he has simply failed to do so. Similarly, pre-certification discovery will not help Plaintiff craft a proper, non-fail-safe class definition. Again, Plaintiff has had more than enough time to propose a class definition that is proper, but for whatever reason, he has simply failed to do so.

In short, Plaintiff has not made even a prima facie case for class certification, nor has he satisfied his burden of demonstrating that pre-certification discovery would produce information that would allow him to substantiate his fundamentally flawed class claims. Because no amount of discovery could salvage Plaintiff's ill-conceived class allegations, the Court should deny Plaintiff's request to conduct pre-certification discovery.

CONCLUSION

For the foregoing reasons, Enagic USA, Inc. respectfully requests that the Court deny Plaintiff's Motion for Class Certification and deny Plaintiff's informal request for pre-certification discovery.

Dated: February 20, 2017

Respectfully Submitted,

Dwight M. Francis, *Pro Hac Vice*
GARDERE WYNNE SEWELL, LLP
2021 McKinney Avenue, Suite 1600
Dallas, TX 75201

/s/ Dwight M. Francis
Attorneys for ENAGIC USA, INC.

PROOF OF SERVICE

STATE OF TEXAS, COUNTY OF DALLAS

I am employed in the County of Dallas; I am over the age of eighteen years and not a party to the within entitled action; my business address is 2021 McKinney Avenue, Suite 1600, Dallas, TX 75201.

On February 20, 2017, I served the following document(s) described as **DEFENDANT ENAGIC USA, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION** on the interested party(ies) in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

Todd M. Friedman
Adrian R. Bacon
LAW OFFICES OF
TODD M. FRIEDMAN
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Beverly Hills, CA 90212
TEL: (877) 206-4741
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Andre Cronthall
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SHEPPARD MULLIN
RICHTER & HAMPTON, LLP
333 S. Hope St., 43rd Floor
Los Angeles, CA 90071
TEL: (213) 620-1780
FAX: (213) 620-1398

☒` **BY CM/ECF NOTICE OF ELECTRONIC FILING:** I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

☒ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 20, 2017, at Dallas, Texas.

/s/ Dwight M. Francis
Dwight M. Francis

EXHIBIT A

DECLARATION OF KOICHIRO HIGA

1. I, Koichiro Higa, declare as follows:

2. I am the President of Enagic USA, Inc. As such, I have personal knowledge of each and every fact stated in this declaration, and if called as a witness, I can and will competently testify to them under oath. I am otherwise competent to make this declaration.

3. Enagic is a direct selling company that markets various products and services to consumers through a network of thousands of independent distributors who reside and operate in most states.

4. As set forth in Enagic's formal Policies and Procedures (the "Policies"), all of Enagic's independent distributors are independent contractors. A true and correct copy of the Policies are attached hereto as **Exhibit A-1.**

5. As independent contractors, Enagic's independent distributors have broad discretion to determine their own methods of sale and means for securing customers, so long as they comply with the Policies.

6. Enagic does not use automatic telephone dialing systems ("ATDS") or prerecorded voice calls to solicit potential customers, independent distributors, or other individuals who have not previously consented to receiving communications from Enagic. However, individuals who are interested in Enagic and its products frequently provide their telephone numbers and other contact information to Enagic

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and expressly request that Enagic contact them with information about the company. Enagic responds to these requests in various ways, including by telephone.

7. Enagic does not direct or encourage its independent distributors to use ATDS or prerecorded voice calls to solicit potential customers, independent distributors, or other individuals who have not previously consented to being contacted. In fact, the Policies expressly prohibit independent distributors from using Enagic's name or copyrighted materials in connection with "automatic calling devices or 'boiler room' operations either to solicit independent distributors or retail customers." *See* **Exhibit A-1** at 30.

8. To the extent Enagic's independent distributors choose, in their discretion, to contact potential customers by telephone, Enagic does not provide them with telephone numbers or other information regarding potential customers, nor does Enagic participate in any way in obtaining that information for its independent distributors. Rather, Enagic's independent distributors acquire potential customers' telephone numbers independently from multiple different sources under a variety of different circumstances. Enagic also does not provide its independent distributors with ATDS, prerecorded voice recordings, or any other telephonic technology that could be used to contact potential customers. Finally, Enagic does not instruct its independent distributors regarding the use of telephonic technology. Enagic exercises no control over its independent distributors' methods

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of sale or means of securing customers, other than to ask that its independent distributors comply with the Policies.

9. Enagic does not possess, maintain, or have access to records of any telephone calls that its independent distributors have made to potential customers or any third parties. If any such records exist, they would be possessed and maintained separately by each independent distributor.

10. Enagic does not possess, maintain, or have access to any records showing whether, or to what extent, independent distributors may have used ATDS or prerecorded voice calls to call individuals who have expressly consented to receive such calls. As stated in the Policies, Enagic does not, and cannot, try to regulate its independent distributors' use of ATDS or prerecorded voice calls in ways that are legal.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 17th day of February, 2017, in Los Angeles, California.

Koichiro Higa

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EXHIBIT A-1

ENAGIC GLOBAL

Enagic

Policies and Procedures

For Global Enagic Distributors

Effective March 2014

This document supersedes all previous editions.

EXHIBIT A-1

Addition and/or Supplemental Change – Article 28

28. Privacy Policy

The Company collects information from independent distributors during the application procedure and from time to time as required for internal purposes such as compliance with state and federal laws and regulations. The Company also collects information through the use of "cookies" when on-line transactions are conducted through the Company's website. The information collected may be used for, among other things, personalizing the independent distributor's experience, improving the Company's website and service, processing transactions, sending periodic correspondence and administering marketing initiatives. The Company implements a variety of security measures to maintain the safety of the information collected.

The Company does not sell or trade the information collected. The Company only shares information as permitted or required by law and with third-party vendors (eg. merchant card processing company) for our everyday business purposes such as merchant card processing companies. Outside of these parameters, the Company will only share your information with your permission.

Addition and/or Supplemental Change – Article 40

If you do not have a direct sale within two (2) years, you are not qualified to receive any commission, 6A educational allowance and/or incentive. This status is called "FA0". Any distributor under FA0 status may re-register in a new position, without regard to their former group, which automatically acts to cancel their former Distributorship.

Addition and/or Supplemental Change – Article 41

41. Kangen UKON Distributorships

Kangen UKON Distributorships automatically entitle the account holder to an Enagic Independent Distributorship for Kangen Water® machines. All the provisions of the Enagic Global Policies and Procedures apply to Kangen UKON Distributors including, but not limited to, their independent contractor status, unless specifically designated as inapplicable.

30. Modification of Product Order

1. Upgrades: All upgrades for product orders require the authorization of the Regional Sales Manager (RSM) for the respective sales area of the order. The Company reserves the right to refuse upgrade requests in its sole discretion.
   (a) Upgrades for new and unused products are allowed within one (1) year of the purchase date.
   (b) Upgrades for used products are allowed within thirty (30) days of the purchase date. A Processing Fee will be charged in the amount noted on the Return Policy form.
2. Downgrades: Downgrades are not allowed for product orders. In the event of an extraordinary circumstance, the respective RSM may provide a waiver within ten (10) business days of the purchase date for new and unused products only. A $50 handling fee will be charged. The Company reserves the right to refuse any such request in its sole discretion. No waiver will be provided beyond the ten (10) business day period.

A Clarification From Enagic

39. Awards and Incentives vs. Commissions – Shoreikin

When Distributors make exceptional contributions to the Company, they become eligible for Shoreikin Awards. Factors demonstrating exceptional contribution include, but are not limited to, outstanding sales efforts and remarkable sales group organization. Shoreikin Awards may differ in name in order to limit the eligible group (eg. 6A 8-Level Award and 6A23 and Above New Incentive Award) but they are all awarded at the sole discretion of the Company. Shoreikin Awards are not paid automatically and will differ based on the overall efforts of our Distributors. Any Distributor subject to an Administrative Hold and/or Disciplinary Action will be ineligible for any Shoreikin Award.

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Policies & Procedures

For Global Enagic Distributors

1. The Company, Policies & Procedures, Distributor Handbook

Enagic USA, Inc., hereinafter the "Company," is a direct selling company marketing health products and other consumer products and services to the consumer through independent distributors. The policies and procedures herein are applicable to all independent distributors of the Company. Further, the published Enagic Distributor Handbook, as amended and published from time to time, is incorporated as a part of these policies and procedures, and the Enagic Distributor Agreement.

2. Distributor Qualifications

An independent Distributor is one who has completed a Company application and distributor agreement and has been accepted by the Company as an independent distributor. All independent distributors must be of legal age in the state in which they reside. The Company reserves the right to accept or reject anyone as an independent distributor.

Unless waived in writing by the Company upon application, the Company will consider a married couple as a single independent distributor. Husbands and wives may sponsor each other directly, but may not be sponsored in different lines. If the Company finds that the a spouse was sponsored in a different line by any reason, the Company reserves the right to change the status of the spouse from an independent distributor into a user, or transfer the distributorship to his or her upline.

Independent distributors are independent marketing representatives of the Company and are not to be considered purchasers of a franchise or a distributorship. The agreement between the Company and its independent distributors does not create an employer/employee relationship, agency, partnership, or joint venture. Independent distributors are independent contractors; they are free to enter into separate agreements with other independent distributors involving the conduct of their distributorships, subject only to the distributor agreement, policies and procedures and distributor handbook. Each independent distributor shall hold harmless the Company from any claims, damages or liabilities arising out of his/her business practices. Independent distributors have no authority to bind the Company to any obligation. Each independent distributor is encouraged to set up his/her own hours and to determine his/her own method of sale, so long as he/she complies with the policies and procedures of the Company.

The company's program is built upon retail sales to the ultimate consumer. The company also recognizes that independent distributors may wish to purchase products or services in reasonable amounts for their own personal or family use. For this reason, a retail sale for bonus purposes shall include sales to non-participants, as well as sales to independent distributors for personal or family use which are not made for purposes of qualification or advancement. It is company policy, however, to strictly prohibit the purchase of product or large quantities of inventory in unreasonable amounts solely for the purpose of qualifying for bonuses or advancement in the marketing program. Independent distributors may not inventory load nor encourage others in the program to load up on inventory. Independent distributors must fulfill published personal and downline retail sales requirements, including requisite retail sales to non-participants, as well as supervisory responsibilities, to qualify for bonuses, overrides or advancements.

3. Transaction Submission Integrity

It is essential to the success of the Company, its independent distributors and customers that submissions of transactions to the Company maintain integrity of communication. It is to be expected that all transactions submissions to the Company, including, but not limited to, distributor applications, distributor communication, distributor financial transactions and consumer transactions, be submitted by the individual or entity involved in the transaction. Third party submission of any and all transactions submissions is prohibited. An independent distributor should not communicate any transactions submissions on behalf of another independent distributor, independent distributor applicant or customer. An independent distributor may not use his or her credit card or bank account on behalf of another individual or independent distributor, except as allowed for as an alternate payer. This rule is applicable to any and all forms of transactions submissions, including, but not limited to, online, telephone, fax, email, etc.

All Enagic Credit System (ECS) financed machines must be shipped to the buyer's home address. Alternate shipping will no longer be accepted. For pick up of ECS financed machines, there will be an ID check. ECS machines must be picked up by the buyer or an existing independent distributor.

4. Business Conduct

In the conduct of business, the independent distributor shall safeguard and promote the reputation of the products and services of the Company and shall refrain from all conduct which might be harmful to such reputation of the Company or to the marketing of such products and services or inconsistent with the public interest, and shall avoid all discourteous, deceptive, misleading, unethical or immoral conduct or practices. An independent distributor shall not interfere with, harass or undermine other independent distributors and, at all times, shall respect the privacy of other independent distributors. An independent distributor must not disparage the Company, other independent distributors, Company products and/or services, the marketing and compensation plans, or Company employees. Violation of the above is grounds for termination.

5. Providing Sponsor Support

Any independent distributor, who sponsors other independent distributors, must fulfill the obligation of performing a bona fide supervisory, distributing and selling function in the sale and/or delivery of product to the ultimate consumer and in the training of those sponsored. Independent distributors must have ongoing contact, communication and management supervision with their sales organization. Examples of such supervision may include, but are not limited to: written correspondence, personal meetings, telephone contact, voice mail, electronic mail, training sessions, accompanying individuals to company training, etc. Independent distributors should be able to provide documentation to the Company of their ongoing fulfillment of sponsor responsibilities.

6. Taxes and Regulation

All independent distributors are personally responsible for paying local, state and federal taxes due on earnings from commissions or any other earnings generated as a seller of Company products and services. The Company does not perform any withholding nor is the firm responsible for unpaid taxes on behalf of independent distributors.

All independent distributors will comply with all state and federal laws and regulations governing the sale of Company products or services.

7. Advertising Correct Information

Independent distributors shall not advertise, make statements or representations about Company products and services and/or marketing plans except as specifically approved, in writing, by the Company; such as its policies and procedures and/or any other official printed literature and publications. Independent distributors agree to make no false or fraudulent representations about the Company, the products, the

Company compensation plan, or income potentials.

Independent distributors do not buy Enagic water treatment systems for resale. The independent distributor acts as an order taker to retail customers, or, orders an Enagic water treatment system for personal use in the capacity as a customer who is also an independent distributor. All Enagic water treatment systems are sold at Enagic specified prices. Independent distributor may not advertise for sale or sell an Enagic water treatment system that deviates from Enagic pricing or offer to provide a customer with a rebate or other consideration to facilitate a lower customer price for an Enagic water treatment system.

8. Trademarks, Trade Names, Advertising.

(a) The name of the Company and other names as may be adopted by the Company are proprietary trade names and trademarks of the Company. As such, these marks are of great value to the Company and are supplied to independent distributors for use only in an expressly authorized manner. Independent distributors agree not to advertise Company products or services in any way other than the advertising or promotional materials made available to independent distributors by the Company. Independent distributors agree not to use any written, printed, recorded or any other material in advertising, promoting or describing the products or services or the Company marketing program, or in any other manner, any material which has not been copyrighted and supplied by the Company, unless such material has been submitted to the Company and approved in writing by the Company before being disseminated, published or displayed.

(b) The independent distributor, as an independent contractor, is fully responsible for all of his/her verbal and written statements made regarding the products, services and/or marketing programs which are not expressly contained in writing in the current distributor agreement, advertising or promotional materials supplied directly by the Company. The independent distributor agrees to indemnify the Company and hold it harmless from any and all liability including judgments, civil penalties, refunds, attorney fees, court costs, lost business or claims incurred by the Company as a result of independent distributor's unauthorized representations.

(c) The Company does not permit the use of its copyrights, designs, logos, trade names, trademarks, etc. without its prior written permission. Independent distributors may not use the Company logo in marketing or sales materials, except upon approved business cards. Trademarked terms such as Kangen Water® and Change Your Water… Change Your Life.® should be appropriately annotated. In addition to general prohibitions on use of the Company trademarks or logos, the Company specifically prohibits the use of Company trademarks or logos in conjunction with the sale of any other non-Company products.

(d) All Company materials, whether printed, on film, produced by sound recording, or on the internet, are copyrighted and may not be reproduced in whole or in part by independent distributors or any other person except as authorized by the Company. Permission to reproduce any materials will be considered only in extreme circumstances. Therefore, an independent distributor should not anticipate that approval will be granted.

(e) An independent distributor may not produce, use or distribute any information relative to the contents, characteristics or properties of Company product or service which has not been provided directly by the Company. This prohibition includes but is not limited to print, audio or video media.

(f) An independent distributor may not produce, sell or distribute literature, films or sound recordings which are deceptively similar in nature to those produced, published and provided by the Company. Nor may an independent distributor purchase, sell or distribute non-Company materials which imply or suggest that said materials originate from the Company.

(g) Any display ads or institutional or trademark advertising copy, other than covered in the foregoing rules, must be submitted to the Company and approved in writing prior to publication.

(h) All advertising, direct mailing, and display including promotional products such as DVDs, CDs, Brochures, Flyers, etc. must be approved in writing before being disseminated, published or displayed. Advertising on radio, TV, newspaper, magazine, and website except independent distributor's own Enagic Web System ("EWS") website is strictly prohibited.

(i) No claims as to the therapeutic or curative properties about the products may be made. In particular, no independent distributor may make any claim that the Company products are intended to diagnose, treat, cure or prevent any disease. Such statements can be perceived as medical claims. Not only is this against Company policy, but it is also against the laws governed by the United States Food and Drug Administration, and the United States Federal Trade Commission. Pursuant to the policy of prohibition of medical, curative or treatment claims, the Company enumerates specific implementation of these policies which shall include, but are not limited to:

   (a) Independent distributors are prohibited from making medical, curative or treatment claims, whether expressed or implied;

   (b) Independent distributors are prohibited from using in all of their marketing materials and promotion any descriptions that are regarded as health or medical claims stating that Kangen Water® may alleviate, cure, diagnose, prevent, relieve, or treat any medical condition, disease, ailment or malady;

(c) Any violation of these guidelines will constitute grounds for disciplinary action, commission suspension and/or termination of distributor status.

(j) Sales of Marketing Materials and Trademark License Agreement: All independent distributors who plan to sell any additional products, including health and beauty related products, other than electrolysis water generator devices must receive prior approval from the Compliance Department of the Company. Each approved item must be specified on the contract called Enagic License Agreement. All independent distributors who have signed the contract must pay a 10% royalty fee based on the total monthly gross sales to the Company. Productions and sales of any marketing materials including DVDs recorded at any seminars without prior authorization from the Company are strictly prohibited in any circumstances. Distributors who violate this article are subject to suspension and/or termination without warning.

9. Internet and Website Policy

Independent distributors are prohibited from creating any independently-designed website relating to the Enagic business, or using any non-EWS current websites. Independent distributors are allowed to advertise on the internet through an approved EWS site (www.enagicwebsystem.com). All independent distributors who are newly subscribing to the EWS will be offered a free 21 day trial. This Company program allows independent distributors to choose from among Company home page designs that can be personalized with the independent distributor's message and his/her contact information. These websites link directly to the Company website giving the independent distributor a professional and Company-approved presence on the internet. Only these approved websites may be used by independent distributors. No independent distributor may independently design a website that uses the names, logos, product or service descriptions of the Company, nor may an independent distributor use "blind" ads on the internet making product or income claims which are ultimately associated with Company products, services or the Company's compensation plan. Independent Distributors using Company names, logos, trademarks, etc. on the internet or any other advertising medium, except as permitted by these policies and procedures shall be subject to immediate discipline, including termination of distributor status.

10. Prohibition of Sales on Unauthorized Internet Sites.

An independent distributor is prohibited from selling or promoting Company products on internet shopping sites, internet auction sites, and internet classified listings including, but not limited to eBay, Amazon, Alibaba, and Craigslist. Any violation of this article will constitute grounds for commission suspension and/or termination of distributor status.

All Warranties on Company products are limited and non-transferable. The Company disclaims all statutory and implied warranties to the extent permitted by law. Warranty benefits shall extend only to the original purchaser unless express written permission has been provided by the Company. The product warranty is limited to the express terms of the Consumer Limited Warranty and the Extended Consumer Limited Warranty.

11. No Spam Policy

It is specific Company policy to prohibit unsolicited email (spamming) or information by facsimile relating to the Company's opportunity and products and services. The Company has a zero tolerance policy of spamming practices. Independent distributors who violate the Company's "no spam policy" are subject to termination, suspension or disciplinary action.

12. Retail Establishments

Company products or services may only be displayed and sold in retail establishments where the nature of the business is to make appointments with customers (such as salons, doctor's offices, and health clubs where appointments are made for personal training or classes are scheduled). The sale of such products or services within such retail facilities must be conducted by an independent distributor and must be preceded by a discussion where the independent distributor introduces the prospective client to the products or services and opportunity just as they would if they had met outside of the retail facility. Company produced literature, banners, or signage only may be displayed on a shelf, counter, or wall and must be displayed by itself. Products or services may not be sold from a shelf or taken from a display for purchase by a customer. Company products or services may not be sold in any retail establishment, even by appointment, if competitive products or services are sold in the establishment. From time to time, the Company may announce policies and rules that expand or contract restrictions on sales in retail establishments.

13. Prohibition on Affiliation with Other Water Treatment Marketing Companies.

(a) It would undermine the basic distributor relationship if independent distributors marketed competing water treatment, water filtration or alkaline water conversion products. Therefore, so long as an independent distributor desires to maintain distributor status, he or she may not sell or market any water treatment, water filtration or alkaline water conversion products that are similar to the products sold by the Company.

(b) 6A2-3 bonus is available only to independent distributors who are exclusive to the Company in direct selling/mlm business.

14. Prohibition of Sales of Kangen Water®

Sales of Kangen Water® or any other water produced from an Enagic® machine, directly or indirectly, is strictly prohibited. This prohibition includes all sales of Kangen Water® in which a person receives water, bottled or otherwise, from an Enagic® machine. No "donation", "membership fee", or other sum(s) may be collected for the distribution of Kangen Water®. Charging customers due to the use of electricity or the general usage of the machine is also prohibited. These are considered to be business expenses and should be paid by the independent distributor. Any violation of this article will constitute grounds for termination of distributor status.

Providing free Kangen Water® in bottled form to a prospective buyer is authorized. However, any labeling on the bottle or attached to the bottle, is strictly prohibited, as it may create confusion that the sample water is "bottled" or "for resale" (rather than a mere sampling provided person to person at no charge) in violation of state or local regulations regarding the "bottling" and/or sale of "bottled water".

15. Trade Shows

With written authorization from the Company, Company products or services and opportunity may be displayed at trade shows by independent distributors. Request for participation in trade shows must be received in writing by the Company at least two weeks prior to the show. Written authorization from the Company must be received before participating in the trade show. Unless written authorization is secured from the Company, Company products or services and opportunity are the only products or services and/or opportunity that may be offered in the trade show booth. Only Company produced marketing materials may be displayed or distributed. No independent distributor may sell or promote the Company products or services or business opportunity at flea markets, swap meets, or garage sales.

16. Assigned Territory

Independent distributors are not assigned exclusive territories for marketing purposes, nor shall any independent distributors imply or state that he/she does have an exclusive territory. There are no geographic limitations on sponsoring independent distributors or selling product within the United States or its possessions or territories and any approved countries in which the Company is registered to do business.

17. International Sales

No independent distributor may export or sell directly or indirectly to others who export the Company's products, literature, sales aids or promotional material relating to the Company, its products or services or the Company's program from the United States or its possessions or territories to any other country. Independent distributors who choose to sponsor internationally may do so only in countries in which the Company or its parent company has registered to operate its business and must comply fully with the Rules of Operation of a Company distributorship in that country. Any violation of this rule constitutes a material breach of this contract and is grounds for immediate termination of the distributorship.

18. Change of Business Name

The Company reserves the right to approve or disapprove independent distributor's change of business names, formation of partnership, corporations, and trusts for tax, estate planning, and limited liability purposes. If the Company approves such a change, the organization's name and the names of the principals of the organization must appear on the distributor application agreement along with a social security number or federal identification number. It is prohibited to make change to attempt to circumvent or violate Company rules on raiding, solicitation, targeting, cross-sponsoring or interference.

19. Cancellation of Distributorship

The distributor agreement may be canceled at any time and for any reason by the independent distributor. All cancellations are accepted and effective as of the date the Company was notified in writing. As of the effective cancellation date, the independent distributor loses all privileges of leadership and downline organization, and is no longer eligible for any commissions, bonuses or prizes. He/she cannot advertise, sell or promote the Company products or purchase product from the Company.

The Company will consider an application to reinstate a "resigned independent distributor" one year after the Resignation Date. As part of the application, the former independent distributor must pledge to adhere to the existing requirements of the

Distributor Agreement and Polices and Procedures. The Company reserves the right to accept or reject, at its sole discretion, such application for reinstatement. The Company shall also have the discretion to reinstate the former independent distributor at his/her former position or at a lesser placement as a condition to reinstatement.

20. Change to Product or Service Prices

The Company shall be entitled to change product or service prices at any time and without notice, and to make changes in the statement of Policy and Procedures.

21. Cooling Off

Notwithstanding the Company's longer retail customer guarantee policy, all retail sales must comply with the FTC Three-Day Cooling Off Rule which requires statutory language and notice of cancellation on the retail sales receipt. The three-day right of cancellation must be orally explained to the customer and the customer must receive a copy of the notice of cancellation form.

22. Company's Signature Products

The signature product of the Company is one which involves water treatment relating to purification and adjustment of alkaline content. This signature product is fundamental to the branding and image of the Company. Therefore, although independent distributors are free to sell, within the guidelines of the Company's policies, products of third party vendors, an independent distributor shall not, during the term of the distributorship, sell products which involve the Company's signature products, namely, products that involve water treatment relating to purification and adjustment of alkaline content. Violation of this provision may result in termination of the distributorship.

23. Prohibition on Raiding and Cross-Solicitation of Products or Other MLM and/or Business Opportunities

The Company takes seriously its responsibility to protect the livelihood of its sales forces and the hard work invested to build a sales organization. Raiding and solicitation actions in which independent distributors seek to raid and solicit other independent distributors in the sales organization to non-Company products and services and to other MLM/business opportunities, severely undermines the marketing program of the Company, interferes with the relationship between the

Company and its sales force and destroys the livelihood of other independent distributors who have worked hard to build their own business, the business of their sales and benefits they have earned by helping to build a sales organization. Therefore, independent distributors shall not directly or indirectly sell to, nor solicit from, other independent distributors for or to any non-Company products or services, or in any way promote to other independent distributors business opportunities in marketing programs of other MLM or business opportunity companies at any time. The independent distributor shall not engage in any recruiting or promotion activity that targets other independent distributors for opportunities or products of other direct selling companies or business opportunities, either directly or indirectly, by themselves or in conjunction with others, nor shall an independent distributor participate, directly or indirectly, in interference, raiding or solicitation activity of independent distributors for other direct selling companies or business opportunities. Unless approved in writing by the Company, this prohibition includes sales or solicitation of non-Company products or services at meetings organized for Company sales, promotion, training recruitment, demonstration, etc. This prohibition on targeting, interference, soliciting and raiding shall be in effect during the term of the distributor agreement and for a period of three (3) years after the termination of the distributor agreement. For the term of this agreement and for three (3) years after termination hereof, an independent distributor shall not, directly or indirectly, recruit any independent distributors to join other direct sales or network marketing companies nor solicit, directly or indirectly, independent distributors to purchase services or products, or in any other way interfere with the contractual relationships between Company and its independent distributors.

Because of the unique nature and signature characteristic and association with the field of water treatment with the Company, and because of the inherent confusion and conflict that may occur, independent distributors may not engage in the representation or sale of water treatment systems offered by any other company.

24. Purchases for Inventory of Mandatory Sales Aids

If the independent distributor has purchased products for inventory purposes or mandatory sales aids while the distributor agreement was in effect, all products in a resalable condition then in possession of the independent distributor, which have been purchased within 90 days of cancellation, shall be repurchased. The repurchase shall be at a price of not less than ninety percent (90%) of the original net cost to the participant returning such goods, taking into account any sales made by or through such participant prior to notification to the Company of the election to cancel. Buyback is 12 months in Massachusetts, Maryland, Montana, Georgia, Louisiana, Wyoming, Texas, Oklahoma, Idaho, Utah, Washington and Puerto Rico. In addition, the Company will honor statutory mandated buyback requirements of every jurisdiction.

25. Vendor Confidentiality

The Company's business relationship with its vendors, manufacturers and suppliers is confidential. An independent distributor shall not contact directly or indirectly, or speak to or communicate with any representative of any supplier or manufacturers of the Company except at a company sponsored event at which the representative is present at the request of the Company. Violation of this regulation may result in termination and possible claims for damages if the vendor/manufacturer's association is compromised by the distributor contact.

26. Commission Recuperation

The Company shall be entitled to repayment of any commission previously paid on a sale of product/service if the product/service purchase is cancelled, reversed (eg. collections activity results in legal or further action), or a refund paid for a terminated purchase. The Company shall recover the commission by adjustment on the distributor's next check payment. In the event that no commission is available for adjustment, the independent distributor who has received the commission shall repay the commission paid on the "reversed sale" within 30 days of the Company's notice to repay.

27. Downline Information Confidentiality

On a periodic basis, the Company will supply data processing information and reports to the independent distributor, which will provide information concerning the independent distributor's downline sales organization, product purchases and product mix. The independent distributor agrees that such information is proprietary and confidential to the Company and is transmitted to the independent distributor in confidence. The independent distributor agrees that he or she will not disclose such information to any third party directly or indirectly, nor use the information to compete with the Company directly or indirectly during or after the term of the distributor agreement. The independent distributor and the Company agree that, but for this agreement of confidentiality and nondisclosure, the Company would not provide the above confidential information to the independent distributor.

28. Privacy Policy

The Company collects information from independent distributors during the application procedure and from time to time as required for internal purposes such as compliance with state and federal laws and regulations. The Company also collects information through the use of "cookies" when on-line transactions are conducted through the Company's website. The information collected may be used for, among other things, personalizing the independent distributor's experience, improving the Company's website and service, processing transactions, sending periodic correspondence and administering marketing initiatives. The Company implements a variety of security measures to maintain the safety of the information collected.

The Company does not sell or trade the information collected. The Company only shares information as permitted or required by law and with third-party vendors (eg. merchant card processing company) for our everyday business purposes such as merchant card processing companies. Outside of these parameters, the Company will only share your information with your permission.

29. Change in Status

1. Marriage: Two independent distributors who marry after having established their own individual distributorships may continue to operate their existing distributorships.
2. Divorce: Should a married couple registered under a common distributorship divorce, they agree to notify the Company as to who will assume responsibility for the distributorship in one of the following manners:
   (a) Written notarized agreement signed by both parties indicating who will retain the distributorship.
   (b) A court order delineating who receives custody over the distributorship
   (c) Both parties may choose to retain their joint distributorship and operate it as a partnership.
   (d) The divorced independent distributors may apply for a new distributorship without having to wait the required three (3) month period.
3. Death: Upon the death of an independent distributor, the rights and responsibilities of the distributorship may be passed on to the rightful, legally-documented heir as long as that person has filled out a new distributor application, together with a copy of death certificate.
4. Disability: Should an independent distributor become disabled to the extent that he/she can no longer fulfill the required duties of an independent distributor, such independent distributor's legal representative or conservator shall:

(a) Contact the Company within thirty (30) days of the disability and advise the Company of the independent distributor's status and the plans for future management or cancellation of the distributorship.

(b) Provide a notarized or court-confirmed copy of appointment as legal representative or conservator.

(c) Provide a notarized or court-confirmed copy of document establishing right to administer the Company business.

(d) Should the legal representative or conservator plan to continue the business of the distributorship, then he/she shall fill out a new distributor application, return policy and W-9, and receive the required training consistent with the disabled independent distributor's level at the time of disability. These requirements shall be satisfied within a deadline of six months.

30. Modification of Product Order.

1. Upgrades: All upgrades for product orders require the authorization of the Regional Sales Manager (RSM) for the respective sales area of the order. The Company reserves the right to refuse upgrade requests in its sole discretion.
   (a) Upgrades for new and unused products are allowed within one (1) year of the purchase date.
   (b) Upgrades for used products are allowed within thirty (30) days of the purchase date. A Processing Fee will be charged in the amount noted on the Return Policy form.
2. Downgrades: Downgrades are not allowed for product orders. In the event of an extraordinary circumstance, the respective RSM may provide a waiver within ten (10) business days of the purchase date for new and unused products only. A $50 handling fee will be charged. The Company reserves the right to refuse any such request in its sole discretion. No waiver will be provided beyond the ten (10) business day period.

31. Sale or Transfer

Products sold to third parties do not qualify those third parties as independent distributors; all those who wish to become independent distributors must go through the normal application procedure. Independent distributors agree to inform all third parties of the facts above and further agree not to promise any possibility of transferring distributorship.

An independent distributor may not sell, assign or otherwise transfer his or her distributorship, marketing position or other distributor rights without written application and approval by the Company. This paragraph is also applicable to transfer of any interest in an entity that owns a distributorship, including but not limited to a corporation, partnership, trust or other non-individual entity. The potential buyer must be at the higher rank as the selling independent distributor. The distributorship must be offered in writing first to the independent distributor's sponsor. If the sponsor declines the offer, the independent distributor may offer the distributorship for sale to the upline independent distributor of the sponsor within the same group. An independent distributor who sells his or her distributorship shall not be eligible to requalify as an independent distributor for a period of at least three (3) months after the sale. The Company reserves the right to review the sale agreement and to verify waiver from the upline sponsor in the event the upline sponsor declines to purchase the distributorship.

A independent distributor may not add a co-applicant to their distributorship and thereafter, remove their name from the distributorship, as an effort to circumvent the Company's sale, assignment, delegation or merger procedures. The primary independent distributor must wait twelve (12) months after adding a co-applicant to the distributorship before they are allowed to remove their name from the distributorship. It is prohibited to use a sale or transfer to attempt to circumvent Company policy on raiding, soliciting, cross-sponsoring or interference.

For the term of three (3) years after sale or transfer, an independent distributor agrees that he/she shall not, directly or indirectly, disrupt, damage, impair or interfere with the business of the Company, whether by way of interfering with, or raiding its employees or distributors, disrupting its relationship with customers, agents, representatives, distributors, suppliers, vendors or manufacturers or otherwise. "Disrupting" or "interfering" shall include, but not be limited to, direct or indirect solicitation or recruitment for other direct selling business opportunities or products or services of other direct selling companies. An independent distributor seeking to sell or transfer his/her distributorship must acknowledge and agree to this provision prior to the finalization of the sale or transfer of their distributorship.

32. Rights of the Company

The Company expressly reserves the right to alter or amend prices, Rules and Regulations, Policies and Procedures, product availability and the compensation plan. Upon notification, in writing, such amendments are automatically incorporated as part of the agreement between the Company and distributor. Company communication of changes may include, but shall not be limited to mail, email, fax, posting on the

Company website, publication in company newsletters or magazines, etc.

(a) Enagic reserves the right to make all final decisions as to the interpretation of the articles stated in these Policies and Procedures. The final company decision based on the interpretation of the articles stated in the Policies and Procedures is effective immediately. All independent distributors are obligated to follow the company's decision as to the interpretation of the articles of these Policies and Procedures.

33. Non-Individual Ownership

A partnership or corporation may be an independent distributor. However, no individual may participate in more than three (3) independent distributorships in any form without express written permission from the Company. Only in the most extreme and extraordinary circumstances will this be considered.

(a) A distributorship may change status under the same sponsor from individual to partnership or corporation or from partnership to corporation with proper and complete documentation.

(b) To form a new distributorship as a partnership or corporation or to change status to one of these forms of business, an independent distributor must request a change request form from the corporate headquarters office. This form must be submitted detailing all partners, stockholders, officers or directors in the partnership or corporation. The partner or officer who submits the form must be authorized to enter into binding contracts on behalf of the partnership or corporation. In addition, by submitting the partnership/corporation from, said individual certifies that no person with an interest in the business has had an interest in a distributorship within three (3) months of the submission of the form (unless it is the continuation of an existing distributorship that is changing its form of doing business).

34. Individual Distributorship

An individual can have up to three (3) distributorships in the Company. He/she may not own any other distributorship, either individually or jointly, nor may he/she participate as a partner, owner, stockholder, trustee, director, or association member, outside his/her sponsorship. An individual shall provide the Company with a W-9 Form with Social Security Number.

35. Entity Distributorship

An entity (corporate) owner can have up to five (5) distributorships in the Company, as long as they are within the same distributorship.

(a) Proprietorship: A copy of fictitious name filing must be submitted, plus a W-9 form.

(b) Corporation: Copies of articles of incorporation with state seal and notarization, list of officers, a copy of Federal ID number (EIN) and a W-9 Form are required, including the page with state seals and notarization. These articles will show who the principals are and prove validation of Federal ID Number/Business Number/E.I.N., plus a W-9 form.

(c) LLC: IRS acceptance only. The name on the IRS acceptance is required to state the LLC in order to use it as an LLC, plus a W-9 form.

(d) Trust: An affidavit of trust with the notarized copy of the power of attorney is necessary. If Federal ID Number is to be used and is not noted in the affidavit, an IRS acceptance will be required, plus a W-9 from.

(e) Partnership: To register as a partner, complete the partnership portion of the Entity Information form, along with all signatures that apply, plus a W-9 form.

36. Entity Guarantee for Owners

Although the Company has offered independent distributors the opportunity to conduct their distributorship as a corporate, LLC, trust or partnership entity, those entities are under the control of its owners and principals, the actions of individual owners or beneficiaries as they may affect Company's business. Therefore, it is agreed that the actions of individual owners or beneficiaries as they may affect the Company and the distributorship are also critical to the Company's business. Therefore it is agreed that actions of the ownership entity's shareholders, officers, directors, trustees, beneficiaries, agents, employees or other related or interested parties and the actions of such parties, which are in contrast to Company's policies shall be attributable to the corporate, LLC, trust or partnership entity.

In the event that any of the ownership entity shareholders, officers, directors, trustees, beneficiaries, agents, employees or other related parties shall terminate ownership interests in the distributorship, any breaching actions by such parties that continue to have a beneficial financial interest, directly or indirectly, in the distributorship shall be attributable to the distributorship.

37. Members of Same Household; Responsibility

Members of the independent distributor's household should operate together under the same distributorship unless otherwise allowed by these Policies and Procedures. Household is defined as husband, wife, and dependents. Children of legal age to contract and at least 18 years of age are not considered a part of their parent's household for the purpose of operating under the same distributorship.

The Company recognizes that members of the same household may belong to competing direct selling opportunities. Although the actions of the parties are normally in good faith, in some circumstances, there is an abuse of relationships in which the non-Company affiliated household member is engaged in recruitment, solicitation or raiding of the Company's organization. The independent distributor is in the best position to prevent raiding or cross-sponsoring activity by his/her non-Company affiliated household member, therefore the cross recruiting activity of the non-Company affiliated household member shall be attributed to the independent distributor.

38. Foreign Distributorships

A foreign person living outside of the United States and Canada may become an independent distributor by providing Enagic with a signed W-8BEN form, in addition to completion of the Product Order Form and Distributor Application, the Return Policy, and any other documentation required by the Company. A foreign independent distributor must never sell Enagic products within the United States and Canada, and the foreign independent distributor's downline must only consist of other foreign independent distributors living and selling Enagic products outside of the United States and Canada.

A foreign independent distributor will be solely responsible for all applicable taxes, duties, and other fees associated with his/her distributorship. The foreign distributorship is subject to all applicable laws and regulations of his/her country of residence. The Company is not responsible for any failure by the foreign distributor to abide by the laws of his/her country of residence or other controlling jurisdiction. While the Company does attempt to provide notice whenever possible, it may not always be possible to do so. Change in Company Policy or other actions such as termination may occur without notice to the independent distributor.

39. Awards and Incentives vs. Commissions – Shoreikin

When independent distributors make exceptional contributions to the Company, they become eligible for Shoreikin Awards. Factors demonstrating exceptional contribution include, but are not limited to, outstanding sales efforts and remarkable sales group organization. Shoreikin Awards may differ in name in order to limit the eligible group (eg. 6A 8-Level Award and 6A23 and Above New Incentive Award) but they are all awarded at the sole discretion of the Company. Shoreikin Awards are not paid automatically and will differ based on the overall efforts of our independent distributors. Any independent distributor subject to an Administrative Hold and/or Disciplinary Action will be ineligible for any Shoreikin Award.

40. Commission, 6A Educational Allowance and/or Incentive for Inactive Distributors (D1, D0, FA0)

If you have a direct sale within six (6) months, you are qualified to receive full commission, 6A educational allowance and/or incentive. This status is called "D1". If you do not have a direct sale within six (6) months, but you have at least one sale within two (2) years, you are qualified to receive fifty percent (50%) of the full commission, 6A educational allowance and/or incentive. This status is called "D0". If you do not have a direct sale within two (2) years, you are not qualified to receive any commission, 6A educational allowance and/or incentive. This status is called "FA0". Any distributor under FA0 status may re-register in a new position, without regard to their former group, which automatically acts to cancel their former Distributorship.

Payment of commission, 6A educational allowance and/or incentive will be made based on the independent distributor status on the date of sale. In the case of an Enagic Payment System (ECS) customer, the distributor status will be decided based on the payoff list issued on the 8th and 22nd each month. If such a day is Saturday, Sunday and/or holiday, the following business day will be applied Payment of commission, 6A educational allowance and/or incentive will be made based on the distributor status as of the date such commission is processed.

Effective January 2012, 6A23 and above distributors Monthly Incentive will change. Your basic achievement rate vs. the previous month will be the deciding factor on the payment.

Achievement rate	
121% over	120% of Basic calculation
111~120%	110% of " "
101~110%	100% of " "

91~100%	90% of " "
81~90%	80% of " "
~80%	70% of " "

For example, in December, Joe sells 1,000 machines within his 8-levels (not 8 points). As he is a 6A2-3, he earns (1,000 x $23) $23,000. In January, he sells 900 machines. (900/1,000 = 90%). As he sold 90% as compared to December, he will receive 80% of his expected bonus:

Expected bonus 900 x $23 = $20,700

Modified for 80% $20,700 x .8 = $16,560

41. Kangen UKON Distributorships

Kangen UKON Distributorships automatically entitle the account holder to an Enagic Independent Distributorship for Kangen Water® machines. All the provisions of the Enagic Global Policies and Procedures apply to Kangen UKON Distributors including, but not limited to, their independent contractor status, unless specifically designated as inapplicable.

42. Default in Payment

A distributorship will be terminated if an independent distributor defaults in payment of product purchases from the Company. In the event an independent distributor purchases product, either in the capacity as an User or an independent distributor, and subsequently defaults on payment, the distributorship is subject to immediate termination. The preceding rule is applicable to an independent distributor in an individual capacity that defaults, a corporate or partnership distributor where one of the principal owners defaults or any other default in payment where the defaulting party has an ownership interest in the distributorship.

43. Disciplinary Actions

Independent distributor's violation of any Policies and Procedures, the distributor agreement, terms and conditions or any illegal, fraudulent, deceptive, or unethical business conduct may result, at the Company's sole discretion, in one or more of the following disciplinary actions:

(a) Issuance of a written warning or admonition.

(b) Imposition of a fine, which may be imposed immediately or withheld from future commission checks.

(c) Reassignment of all or part of an independent distributor's organization.
(d) Freezing of commissions for an indefinite period.
(e) Suspension, which may result in termination or reinstatement with conditions or restrictions.
(f) Termination of the distributorship.

44. Right to Terminate

The Company reserves the right to terminate any distributorship at any time for cause when it is determined that the independent distributor has violated the provisions of the distributor agreement, including the provisions of these policies and procedures as they may be amended or the provisions of applicable laws and standards of fair dealing. Such involuntary termination shall be made by the Company at its discretion. Upon an involuntary termination, the Company shall notify the independent distributor by mail at the latest address listed with the Company for the distributor. In the event of a termination, the terminated independent distributor agrees to immediately cease representing him/herself as an independent distributor.

45. Termination

(a) When a decision is made to terminate a distributorship, the Company will inform the independent distributor in writing that the distributorship is terminated immediately, effective as of the date of the written notification. The termination notice will be sent by certified mail to independent distributor's address on file with the Company.
(b) The independent distributor will have fifteen (15) days from the date of mailing of the certified letter in which to appeal the termination in writing, and provide written response to the finding of violations of Company agreement, policies and/or rules. The independent distributor's appeal and/or response correspondence must be received by the Company within twenty (20) days of the Company's termination letter. If the appeal is not received within the twenty (20)-day period, the termination will be automatically deemed final.
(c) If an independent distributor files a timely appeal of termination, the Company will review and consider the termination, consider any other appropriate action, and notify the independent distributor of its decision. The decision of the Company will be final and subject to no further review. In the event the termination is not rescinded, the termination will be effective as of the date of the Company's original termination notice. The terminated distributor may not be sponsored as an independent distributor again.

(d) Upon termination of a distributorship, all rights cease. He/she is no longer eligible for any commission, bonuses or prizes. He/she cannot advertise, sell or promote the Company products or purchase products from the Company.

46. Sponsorship

All independent distributors have the right to sponsor others. In addition, every person has the ultimate right to choose his/her own sponsor. If two independent distributors should claim to be the sponsors of the same new independent distributor, the Company shall regard the first application received by the corporate home office as controlling.

(a) As a general rule, it is good practice to regard the first independent distributor to meaningfully work with a prospective independent distributor as having first claim to sponsorship, but this is not necessarily controlling. Basic tenets of common sense and consideration should govern.

(b) As a convenience to its independent distributors, the Company may provide various method of registering or informing the Company of newly sponsored independent distributors, including facsimile registration and online registration. Until such time as the Company receives an application, either as hard copy, facsimile or digital data, containing all appropriate information, as well as the signature of the proposed new distributor, the Company will only consider the incomplete facsimile or online registration in the category of "intended" registration. Thus, although the Company is attempting to create some convenience for its sponsoring distributors, it is the responsibility of the sponsoring independent distributor to cause delivery to the Company of a completed and signed distributor agreement and completed W-9 if the sponsor is to expect recognition as the official sponsoring independent distributor.

(c) There is no "magic" involved in the Company or in any business. Those who sponsor widely but who do not help new independent distributors develop their business meet with limited success. Therefore, it is the independent distributor's responsibility to follow through and make sure the new independent distributor is properly informed and trained in the areas of the product, the compensation plan, the policies and procedures and the professional guidelines of the network marketing industry.

(d) When soliciting a prospective independent distributor to join the Company's network program, the independent distributor must clearly explain the following:

1. Products: type, performance and quality of each product.

2. Compensation plan
3. Policies and Procedures.
4. Independent distributor's rights and duties.
5. Other important items that will affect the judgment of the prospective distributor.

(e) Independent distributors should never provide false information in order to encourage the conclusion of a sales agreement or to prevent the buyer from canceling the agreement.

(f) Retail sales are a requirement of the Company's network program.

(g) Each independent distributor must identify himself or herself by name and Company ID number to the prospective buyer.

(h) The Company offers no sales discounts or other concessions and the distributor may not offer either. Any discounts offered by distributors may be grounds for termination.

47. Transfer of Sponsorship

Transfer is rarely permitted and is actively discouraged. Maintaining the integrity of sponsorship is absolutely mandatory for the success of the overall organization.

(a) Transfers will generally be approved in only one of two (2) circumstances:

1. In the case of unethical sponsoring by the original sponsor. In such cases, the Company will be the final authority.
2. Resigning from the Company entirely and waiting six (6) months to reapply under the new sponsor.

(b) In cases of unethical sponsoring, the independent distributor may be transferred with downline intact; in all other events, the individual alone is transferred without any downline being removed from the original line of sponsorship.

48. Income Claims

No income claims, income projections nor income representation, nor showing of commission checks ("check waving") may be made to prospective independent distributors. Any false, deceptive or misleading claims regarding the opportunity or product/service are prohibited. In their enthusiasm, distributors are occasionally tempted to represent hypothetical income figures based upon the inherent power of network marketing as actual income projections. This is counter-productive, since new independent distributors may be quickly disappointed if their results are not as extensive or as rapid as a hypothetical model would suggest. The Company believes firmly that the income potential is great enough to be highly attractive in reality without resorting to artificial and unrealistic projections.

49. Representation of Status

In all cases, any reference the independent distributor makes must clearly set forth the independent distributor's independent status. For example, if the independent distributor has a business telephone, the telephone may not be listed under the Company's name or in any other manner which does not disclose the independent contractor status of the distributor.

50. Judgment and Tax Lien

The Company will comply fully with any court order or instruction/demand by any government taxing authorities within the United States and Canada that orders, instructs or demands the withholding of a independent distributor's earnings from his/her distributorship with the Company.

51. Subpoenas Duces Tecum (Demands for Records)

Assuming proper jurisdiction, the Company will comply with all subpoenas duces tecum demanding financial compensation records of an independent distributor in his/her capacity as an independent contractor with the Company.

52. Request for Records

The Company will comply fully with all requests for records accompanied by a properly prepared and signed Authorization by the person whose records are being sought. The Company will comply fully with all requests for records by government agencies with the authority to request such records and accompanied by the requisite legal documentation.

53. Business Cards and Stationery

Any printed materials, including business cards and stationery, must be approved by the Company in advance. Criteria for approving these materials will include a judgment regarding the quality of the materials as well as properly setting forth the independent status of the independent distributor.

54. Telephone Solicitation

The use of the Company's name or copyrighted materials may not be made with automatic calling devices or "boiler room" operations either to solicit independent distributors or retail customers. The use of these methods in ways that are legal and are the equivalent of the "blind ads" alluded to above cannot be regulated by the Company.

55. Press Inquiries

Any inquiries by the media are to be referred immediately to the Company. This policy is to assure accuracy and a consistent public image.

56. Endorsement

Federal and state regulatory agencies rarely approve or endorse direct selling programs. Therefore, independent distributors may not represent that the Company's program has been approved or endorsed by any government agency.

57. Indemnification and Hold Harmless

The independent distributor hereby indemnifies and releases the Company, its officers, directors, agents and assigns and holds harmless from and against the full amount of any and all claims, causes of action, judicial and administrative proceedings suits, charges, liabilities, losses, damages, costs and expenses, including without limitation court costs and reasonable fees and expenses of attorneys and consultants, which are or may be made, filed or assessed against Company at any time arising out of distributor's business operations and representations made by distributor in the operation of his/her business, arising from the following:

a) Violation and/or lack of compliance with terms of the distributor agreement, policies and procedures, rules and regulations, marketing program manual or guidelines or any other directive from the Company as to method and manner of operation of the independent distributor business;
b) Engaging in any conduct not authorized by the Company in the Company market program;
c) Any fraud, negligence or willful misconduct in the operation of the independent distributor business;
d) Misrepresentation or unauthorized representation regarding the Company's product or service, marketing opportunity or potential or the Company's marketing program;
e) Failure to adhere to any federal, state, or local law, regulation, ordinance

and/or any order or rule issue by any court of appropriate jurisdiction;

f) Engaging in any action which exceeds the scope of authority to the distributor as granted by the Company.

g) Engaging in any activity over which Company has no effective control as to the actions of the distributor.

58. Waiver

The Company never gives up its right to insist on compliance with these rules or with the applicable laws governing the conduct of a business. This is true in all cases, both specifically expressed and implied, unless an officer of the Company who is authorized to bind the Company in contracts or agreements specifies in writing that the Company waives any of these provisions. In addition, any time the Company gives permission for a breach of the rules, that permission does not extend to future breaches. This provision deals with the concept of "waiver," and the parties agree that the Company does not waive any of its rights under any circumstances short of the written confirmation alluded to above.

59. Governing Law

These policies and procedures are reasonably related to the laws of the state of California and shall be governed in all respects thereby. The parties agree that jurisdiction and venue shall lie with the place of acceptance of the distributor application which is Torrance, California.

60. Partial Validity

Should any portion of these policies and procedures, of the distributor's application and agreement, distributor handbook or of any other instruments referred to herein or issued by the Company be declared invalid by a court of competent jurisdiction, the balance of such rules, applications, or instruments shall remain in full force and effect.

SunUs	Continuous electrolysis water generator which produces three types of water including clean water, Kangen Water®, and acidic water.
LeveLuk Jr II	Continuous electrolysis water generator which produces five types of water including clean water, Kangen Water®, acidic water, strong Kangen Water®, and strong acidic water.
LeveLuk DX	Continuous electrolysis water generator which produces five types of water including clean water, Kangen Water®, acidic water, strong Kangen Water®, and strong acidic water.
LeveLuk DX II	Continuous electrolysis water generator which produces five types of water including clean water, Kangen Water®, acidic water, strong Kangen Water®, and strong acidic water.
LeveLuk SD501	Continuous electrolysis water generator which produces five types of water including clean water, Kangen Water®, acidic water, strong Kangen Water®, and strong acidic water.
LeveLuk Super 501	Continuous electrolysis water generator which produces five types of water including clean water, Kangen Water®, acidic water, strong Kangen Water®, and strong acidic water.
Anespa	Shower machine which removes chlorine from tap water and produces mineral ion water continuously.
Ukon	Food supplement which contains turmeric, squalene, rice oil, Oil extract, alpinia speciosa leaf extract, vitamin C, DHA, and Kangen Water®.

Product Handling and Independent Distributor's responsibility:

1. The prospective independent distributor shall fulfill stated personal sales volume requirements to be recognized and registered as an active Enagic distributor.
2. Special favorable payment plans are available to independent distributors who wish to purchase company products.
3. The independent distributor may sell products through the credit companies that have valid agreements with the Company.
4. The independent distributor shall take full responsibility for any of the following issues arising in connection with his/her own customer.
   (1) The independent distributor shall take the following actions without delay in case of cancellation of a sales agreement during the cooling-off period.
      (a) Return the commission and other applicable fees/charges to the Company
      (b) Substitute the cancelled account with another account.
      (c) Any actions other than (a) and (b) above will be taken after discussion

among the independent distributor, the Company and referrer.

(2) Providing such information as the Company may request from time to time in connection with the Company's collection of money payable for the products.

(3) Providing such information as the Company may request from time to time in connection with the Company's handling of sales-related claims other than the above.

The Sales Commission shall be paid by check issued by the Company in favor of the independent distributor promptly after the expiration of the cooling-off period, and otherwise based on the independent distributor's instruction.

Selling Price and Sales Commission of Product (excluding tax)

PRODUCTS	UNIT PRICE	COMMISSION 1P	
SUN US	$1,280.00	$55 $25	D1 *SP
		$80	
LEVELUK Jr Ⅱ	$2,380.00	$135 $25	D1 *SP
		$160	
LEVELUK DX	$2,980.00	$225 $0	D1 *SP
		$225	
LEVELUK DX II	$3,280.00	$205 $30	D1 *SP
		$235	
*SD 501	$3,980.00	$235 $50	D1 *SP
		$285	
SUPER 501	$5,980.00	$400 $0	D1 *SP
Anespa	$2,390.00	$180 $0	D1 *SP

*** SP (Special Point) point is a bonus commission paid when the next sale occurs within 3 months**